No. 78-5374, Smith v. Maryland

3-30-79

The Chief Justice +

Brennan, J. —

On merits, tho gets mfn at
otherwise dr u law
Tr suffi for guard as a S
Shd b okay to get a W

Stewart, J. DIG

On merits and —
DIG
Cd u get nuts con - asked cop for help.
All PR did was lead to them v gun
& fam lineups - all look alike
She picked him out
Ty knows who he was B/c ty put
+ PR on him

On merits wd b mi w/ S

White, J. +

N much v a case
N a S
Cd DIG

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Marshall, J. —

Hearty bd pc
Ca DIG
Reopen D —

+
Katz applies + DMN's 2 tests
Under it, +

Powell, J.

obs

Rehnquist, J. +

Wi Hill
No legit objection v primary in +
Ps decided
Can concede a S but no reasonable
? ca DIG

Stevens, J. +

Best recon we have
Ld +
Trial v this done on mere
suspicion
N would warn v primary
Jury + d simple + get a W
N a S j of it – is, reas.

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78-5371 Smith v Maryland

Pen register on tel calls - 4th Am S?

∴ Is a pen register a S within 4 Am reg a W?

All agree Katz controls

2 Harlan tests in this case in Katz:

A. Does he hv an actual expectation of privacy

Tele users do

Long distance routine

Pen call rates for some

Computer technology

/

B If so, is it objectively reas?

If try do, it is reas.

Bus recs furnished to 3s

Used for harassment, obscene, etc

Hand covers - surveillance -

Notify as to contents

+

27 March 79

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No. 78-5374 - Smith v. Maryland

Argued: March 28, 1979

End of March Session

1:45 Mr Cardin — short, baldy dark

R- what r old "number, please"

Ted says requires a 60 B/A per register insp & installed

2:11

2:11 Mr Sachs — mid a S — 6 — mid, gunny, dark 45!

No stg bar us + tele

Shd hv no obstr expectation

& bars communicate

Hs every reason + record & reveal.

2:25

2:25 Mr Cardin

2:28

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A

Await response, [illegible]
G?

10 K 5/3/5

Response requested & rec'd. The State concedes that the question whether a warrant is req'd for installation of a pen register is open in this Court, and that "there appears to be a split of authority on the subject." However resp says that the decision below was right.. The 4th Am protects the content of conversations, not the fact that conversations transpired. Telephone users have no expectation of privacy in the numbers they dial since (1) they realize that records of toll calls are kept and have no clear awareness of the line between toll and local calls, nor of the phone co's actual record-keeping practices; (2) they realize that the numbers called must be revealed to the phone co, since it is through the phone co's switching equipment that the calls are completed. Indeed, people have even less expectation of privacy as to the numbers dialed than as to bank records or conversations with wire informers, since in the former case there is absolutely no content conveyed. Since there is no 4th Am protection in the latter cases, the absence of protection in the former is a fortiori. I agree with resp, but in view of the fairly strong conflict I would grant. The Court may, however, want to wait til the conflict becomes more firmly cemented.

11/25/78 AGL

PRELIMINARY MEMORANDUM

Dec 1, 1978, Lab, SS

~~October 27, 1978 Conference~~
~~List 4, Sheet 3~~

No. 78-5374 CSY

4-3

SMITH (robber)	Cert to Md. Ct. App. (Murphy, Smith, Levine, Orth; Digges, Eldridge, Cole, dissenting)	
v.		
MARYLAND	State/Criminal	Timely

1. SUMMARY: Does the installation of a pen register constitute a search within the meaning of the Fourth Amendment?

2. FACTS: Ms. McDonough was robbed. She gave police a description of the robber and of a 1975 Monte Carlo that she had observed in her neighborhood shortly before the robbery. After the robbery, she began receiving threatening and obscene phone calls from a man who identified

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himself as the person who robbed her. Police spotted a man who met the description of the robber driving a 1975 Monte Carlo. By tracing the license number of the vehicle, police learned that the car was registered in petr's name. At the request of the police, the telephone company installed a pen register at its central offices to record the phone numbers of all calls from the telephone at petr's residence. Police did not obtain a warrant or court order before installing the pen register. Thereafter, the pen register showed that a call was made to McDonough's home. Armed with a search warrant, police searched petr's home and found a notation of McDonough's telephone number next to petr's phone. McDonough identified petr as the robber at a line-up. At a pretrial suppression hearing, petr argued that evidence resulting from the installation of the pen register should be suppressed because absent a court order or search warrant, the use of a pen register constituted an illegal search and seizure in violation of the Fourth Amendment. The trial judge denied the motion, petr was found guilty of robbery and sentenced to 10 years imprisonment. The Maryland Court of Appeals affirmed.

3. DECISION BELOW: The majority stated that under Katz v. United States, 389 U.S. 347 (1967), the question whether installation of a pen register requires compliance with the Fourth Amendment depends on "whether a telephone subscriber has a constitutionally protected expectation that the numbers which he dials will remain private." The court held that a subscriber does not have a constitutionally protected ex-

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pectation of privacy with respect to the numbers dialed for two reasons. First, every subscriber realizes that the phone company keeps records of toll calls and there seems no valid distinction between the expectations associated with local calls and toll calls because most subscribers probably have no "real knowledge" of the geographic boundaries on their "local call" zone. Second, all telephone subscribers use equipment owned by a third party and therefore it is unreasonable to assume that the fact of one's call passing through the system will remain a total secret from the phone company. While the Fourth Amendment protects the content of conversations, pen registers do not reveal that content and they are regularly used by the phone company without a court order "for the purposes of checking billing operations, detecting fraud and preventing violations of the law." United States v. New York Tel., 434 U.S. 159, 174-75 (1977). The court found support for its conclusions in cases dealing with the attachment of transmitters to informants, inspection of bank deposit slips turned over to the bank, use of beepers, and reading of mail covers, all of which either this Court or other courts have held do not violate the Fourth Amendment. The majority cited several cases in which courts have held that telephone subscribers have no reasonable expectation that records of their calls will not be made. See, e.g., Hodge v. Mountain States Tel. & Tel., 555 F.2d 254 (9th Cir. 1977); United States v. Clegg, 509 F.2d 605 (5th Cir. 1975).

The dissenters believe that the installation of a pen register constitute a search within the meaning of the Fourth Amendment. While a subscriber

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may expect that completed long distance calls will be recorded, the subscriber does not expect that the phone company will monitor the telephone numbers of local calls. Contrary to the majority's view, subscribers are aware of their "local call" zone because, at least in Maryland, they must dial the prefix "1" before they can make a call beyond that zone. "The defendant, by the simple act of dialing local numbers, did not reasonably intend to reveal information; he merely made use of machinery in particular ways which, without the police intrusion, would have remained fully private." They found the analogy to the transmitter-on-informer and bank deposit slip cases unpersuasive because the phone company is not a "party" to telephone conversations in the same sense as the informer and bank are parties to the conversations or bank transactions. Mail cover cases also are distinguishable since anything written on the outside of an envelope is placed in the plain view of the public. Finally, the dissenters noted that several courts have held that the installation of pen registers is subject to Fourth Amendment requirements. See, e.g., Southwestern Bell Tel. v. United States, 546 F.2d 243 (8th Cir. 1976), cert. denied, ____ U.S. ____ (1978); New York Tel. v. United States, 538 F.2d 956 (2d Cir. 1976), ~~cert. denied~~ revd, 434 U.S. 149 (1977); United States v. Illinois Bell Tel., 531 F.2d 809 (7th Cir. 1976); United States v. John, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975).

how about beepers?

4. CONTENTIONS: Petr simply repeats the arguments of the dissenters. He claims that there is a split among the lower courts on this question as evidenced by the cases relied on by the majority and dissenters and

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that the Court should grant cert in this case to resolve the conflict. Finally, he argues that the following statement by Mr. Justice Powell, concurring and dissenting, in United States v. Giordano, 416 U.S. 505, 553-54 (1974) "should be dispositive of this issue":

> "Because a pen register is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment."

5. DISCUSSION: This Court has not yet determined whether pen register surveillance is subject to the requirements of the Fourth Amendment. The question was specifically reserved in United States v. New Tel., 434 U.S. 159, 165 n. 7 (1977). And in a footnote following the above-quoted statement by Mr. Justice Powell in Giordano, he stated that he did not have to address the question whether the use of a pen register constitutes a search because, assuming the applicability of the Fourth Amendment, its requirements were satisfied in that case. 416 U.S. at 554 n. 4. The claimed split in the circuits on this question may be more apparent than real. The court in John specifically declined to decide whether the use of pen registers constitutes a search. None of the other cases really addressed the question whether use of the device is a search; instead, they simply quoted the statement from Mr. Justice Powell relied on by petr and assumed that the Fourth Amendment governs installation of pen registers, apparently without recognizing that Mr. Justice Powell declined to decide that question. In any event, in all of the cases relied on by the dissenters, the Government had secured a

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court order or warrant before installing the pen register. Hodge, supra relied on by the majority, was a § 1983 action against the telephone company in which the CA 9 held that, assuming state action, the expectation of privacy protected by the Fourth Amendment attaches to the content of a telephone conversation and not to the fact that the conversation took place. In Clegg, supra, the CA 5 stated in dicta that the Government's use of a pen register would not be subject to the Fourth Amendment's requirements. Thus, there is no clear conflict in the "holdings" of the cases cited, although the predilections of the courts cited seem obvious and those predispositions do differ.

Should the Court be interested in addressing this issue, despite the lack of a clear conflict below, this case may be a good candidate. The opinions below are well researched and thoughtful, and the factual setting of this case is uncomplicated and squarely serves up the issue.

There is no response, but I understand that one already has been requested.

10/20/78 Kravitz Op in petn.
CMS

10/21/78

See attachment
AGZ

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No. 78-5374

The memo writer is correct that there is no rock-solid conflict among the circuits as to whether installation of a pen register constitutes a "search." Just the same, there is quite a bit of disagreement among them. CAs 2, 7 & 8 have assumed that installation of pen registers is a search; in each case, however, the Govt had secured court orders authorizing the installations and the CAs held that these orders were supported by probable cause and hence satisfied the 4th Amend warrant requirement. In Hodge, CA 9 held that installation of a pen register was not a search, but confined its holding to the facts of that case, where the telephone co was doing its own investigation of obscene calls, rather than helping the Govt investigate crime. In Clegg CA 5 likewise said that installation of a pen register was not a search; although this was not the "holding" of the case, it was a critical step in the chain of reasoning by which CA 5 reached its holding. Given the evident disparity in approach taken by the CAs, the large number of pen register cases that are bubbling up these days, and the fact that the "search" question is open in this Court, I would be inclined to grant unless the State's response is very convincing.

10/21/78 AGL

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No. 78-5374
SMITH
v.
MARYLAND

Cert to Md CtApps
(Murphy, Smith, Levine, Orth;
Digges, Eldridge, Cole dissenting)

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3/26/79 AGL

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SUMMARY

This little case presents one question: whether the installation of a pen register constitutes a "search" for purposes of the 4th Amendment, such that a warrant for its installation is required. Everyone seems to agree that Katz governs the case, and that Justice Harlan's two-pronged inquiry is appropriate: first, did petr have an actual (subjective) expectation of privacy; and second, if he did, is society prepared to recognize that expectation (objectively) as reasonable? The parties disagree only as to how these questions should be answered as to pen registers.

The case seems quite easy to me. I conclude that telephone users in general probably do not entertain any expectation of privacy as to the numbers they dial into the national telephone network; and that, even if users do have some expectation of privacy, this expectation is not "reasonable." Hence, the installation of a pen register is not a "search" and no warrant is required.

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I. FACTS

The facts, which were stipulated, are as follows. Ms McDonough was robbed. She gave police a description of the robber and of a 1975 Monte Carlo she had observed near her home just before the robbery. After the robbery, she began getting threatening phone calls from a man identifying himself as the robber. Police saw a man who met McDonough's description driving a 1975 Monte Carlo in McDonough's neighborhood. By tracing the license plate number, police learned that the car was registered in petr's name.

Ten days after the robbery, the telephone company (Telco), at police request, installed a pen register at its central offices to record the phone numbers of all calls made from the telephone at petr's residence. (A pen register records only the numbers dialed; it does not reveal the contents of the call, or whether the call was completed.) Police did not get a warrant or court order before having the pen register installed. The register subsequently revealed that a call was made from petr's residence to McDonough's phone. The police then got a warrant to search petr's house; that search turned up a notation of McDonough's name and number alongside petr's phone. Petr was arrested and McDonough identified him in a line-up as the robber.

At a pre-trial suppression hearing, petr contended that the installation of a pen register, absent a court order or warrant, was an illegal search and seizure in violation of the 4th Amendment. On petr's theory, the evidence gained from the pen register (i.e., the fact that petr had called McDonough), and the evidence gained pursuant to the search warrant issued in part on the basis of the pen register data, had to be suppressed. The trial judge denied petr's suppression motion and petr was convicted. The Md CtApps granted cert directly to the trial court.

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II. DECISION BELOW

The CtApps noted that this Court had reserved decision on the applicability of the 4th Amendment to pen registers. US v Giordano, 416 US 505, 553-54 & n.4 (1974) (LFP dissenting); US v NY Tel Co, 434 US 159, 165 n.7 (1977). The question whether installation of a register was a "search" subject to the warrant requirement, therefore, had to be answered by resort to basic 4th Amendment principles, as enunciated in Katz v US, 389 US 347 (1967). Under Katz, the answer depended on whether a telephone subscriber has a constitutionally protected expectation that the numbers he dials will remain private. In seeking this answer, the CtApps adopted the two-fold test articulated by Justice Harlan in his Katz concurrence: "first, a person [must] have exhibited an actual (subjective) expectation of privacy, and second, that expectation [must be one that society is prepared to recognize as 'reasonable.'" 389 US at 361.

The CtApps then applied this two-fold test to the facts of this case. As to actual expectations of privacy, the court noted that an expectation of privacy normally extends to the content of a conversation, rather than to the fact that a conversation took place or that a particular number was dialed. Most phone subscribers, moreover, are aware that the Telco routinely makes records of phone calls. It is true, of course, that the Telco usually maintains tool-call records only of long-distance calls, not of local ones. Yet most subscribers, the court suggested, are unaware of the precise boundaries of their local dialing zones, especially when those zones don't coincide with geographical boundaries. Further, the Telco often keeps records of all calls from phones subject to a special rate structure. Hodge v Mountain States Tel Co, 555 F2d 254, 266 (CA 9 1977) (Hufstedler, J, concurring). Although it was difficult to know exactly how much privacy the average

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subscriber expected with respect to the numbers he dialed, the CtApps thought subscribers generally possessed a general understanding that calls are placed through electronic equipment and that some record of those calls was made.

Secondly, even if subscribers were vaguely aware that the Telco did not keep records of local calls, and if they consequently entertained some expectation of privacy regarding local numbers dialed, this did not necessarily mean that society was prepared to recognize that expectation as "reasonable." All subscribers utilize equipment owned by the Telco: in order to complete a call, the subscriber must "convey" the number to the Telco's switching equipment. Under these circumstances, it would be unreasonable for the subscriber to assume that the fact of his call's passing through the network will remain a total secret to the Telco. Once it is conceded that subscribers have no legitimate expectation of privacy respecting long-distance calls, moreover, it would be bizarre to make the existence of a constitutionally-protected privacy interest depend on how the Telco defined its "local call zone" or how it organized its billing policy. If the Telco decided to drop the flat monthly charge, for example, and to record <u>all</u> calls (local and otherwise) for billing purposes, the Telco would effectively extinguish subscribers' privacy interest in the numbers dialed. Once it is conceded that subscribers have no privacy interest in toll-billing records, and that the Telco is free to keep whatever billing records it chooses, it would be anomalous to say that subscribers have a "legitimate expectation of privacy" in locally-dialed numbers simply because the Telco does not currently choose to keep records of them.

For these reasons, the CtApps concluded that subscribers have no "legitimate expectation of privacy" with respect to <u>any</u> numbers they dial. The court derived support for this conclusion from three analogous

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lines of cases. The first line consisted of cases like US v White, 401 US 745 (1971) (person has no legitimate expectation of privacy in statements made to informant "wired for sound") and US v Miller, 425 US 435 (1976) (bank depositor has no legitimate expectation of privacy in checks and deposit slips in bank's possession). Just as the speaker in White and the depositor in Miller "took the risk" that the third party would turn the information over to the Govt, so a subscriber, realizing that the numbers he dials must necessarily be conveyed to the Telco, "takes the risk" that it will in turn hand the information over to the police. The second line of cases involved mail covers, which the CAs generally have approved. In a mail cover, the Govt views information on the outside of a sealed envelope travelling through the mails; the Govt may learn the origin and destination of the envelope, but not the contents of the letter itself. A pen register was quite similar: the Govt learns numerical data indicating the destination of the call, but nothing whatsoever about the contents of the communication. The third line of cases involved beepers, which the CAs again have generally upheld. Just as a person has no legitimate expectation of privacy as to his location when he is travelling about in public, so a subscriber has no legitimate expectation of privacy in the numbers he dials into the national telephone network.

For these reasons, the CtApps concluded that, even if subscribers do have some expectation of privacy in the numbers they dial, this expectation is not one that society is prepared to recognize as "reasonable." Congress, in exempting pen registers from Title III of the Omnibus Act, obviously expressed the judgment that such devices do not pose a threat to privacy of the same dimension as the interception of oral communications. As this Court said in NY Tel Co, pen registers are regularly used by the Telco, without court order, "for purposes of

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checking billing operations, detecting fraud, and preventing violations of law." Under these circumstances, any expectation of privacy as to numbers dialed over the phone network would be unreasonable.

Three judges dissented. They believed that subscribers do have an expectation of privacy in their local calls, and that this expectation was objectively "reasonable." First of all, routine Telco activities do not include the monitoring of local calls, since most customers pay for the basic use of Telco equipment at a flat rate. The overwhelming number of calls, moreover, are local calls. The majority's assertion that customers are unaware of the boundaries of local-call zones was, in the dissent's view, mere speculation: in Md, at any rate, callers had to dial the prefix "1" in order to get out of their local area. Secondly, subscribers' expectation of privacy was "reasonable." True, subscribers necessarily entrust the numbers they dial to Telco electronic equipment, but it cannot be deduced from this that subscribers voluntarily intend to transfer information to the Telco. Subscribers, "by the simple act of dialing local numbers, do not reasonably intend to reveal information; they merely make use of machinery in particular ways which, without police intrusion, would have remained fully private."

The dissent rejected the "analogies" the majority sought to draw from other lines of cases. White and Miller, in the dissent's view, were inapposite: in those cases, the defendant made a knowing and voluntary communication to the third party, and thus truly "assumed a risk." The subscriber, by contrast, does not knowingly and voluntarily reveal information to the Telco. The mail cover and beeper cases were likewise irrelevant: in those cases, the defendant subjected his letters or his person to full public inspection; the subscriber, on the other hand, dial phone numbers in the privacy of his home, and "reveals" them only to the inanimate switching equipment of the phone company.

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III. CONTENTIONS

A. Petr.

Petr agrees with the court below that the outcome here is governed Katz, and likewise agrees that Justice Harlan's two-pronged inquiry is to be applied. Petr simply disagrees with the CtApps as to how the two questions are to be answered.

(1) Did Petr Exhibit an Actual Expectation of Privacy? Petr contends that he did: by placing his call to McDonough in the privacy of his home, petr evinced an intent to shut out the "uninvited eye or ear" just as Katz did by shutting the door to his public phone booth. Of course, despite petr's attempt to secure privacy, he necessarily revealed the number he was dialing to the Telco's switching equipment. As the dissent below said, however, petr did not thereby betray any subjective intent to transfer information to the phone company; indeed, since this was a local call, the Telco made no record of it at all. By making his call in the privacy of his home, petr took reasonable steps to protect the number he dialed from curious members of the public at large; by so doing, he manifested a subjective expectation of privacy. The fact that the number he dialed was recognized as a pattern of beeps or pulses by Telco switching machinery does not suggest that petr's subjective expectation of privacy was any less.

(2) Is Society Prepared to Recognize Petr's Subjective Expectation as "Reasonable"? Petr suggests that the answer to this question depends on a balancing of "privacy interests" against "effective law enforcement interests." On the one hand, the burden on law enforcement should a warrant requirement for pen registers be imposed would be slight. Obviously, it takes some time to get a warrant, but it take time to get any kind of search or arrest warrant; judging from the number of pen register cases (e.g., NY Tel Co) in which the FBI or police did get a court order prior to installation, petr suggests that the t

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burden posed by getting one is probably slight. On the other hand, the protection that a warrant requirement would offer privacy interests is substantial. Petr notes that pen registers can be abused: they may easily be converted into wiretaps by attaching earphones. See Note, 1977 Duke L J 751, 759. Petr cites congressional testimony about abuses of wiretaps, and suggests that pen registers can be similarly abused. In order to prevent "slippery slope" problems, petr says, a warrant should simply be required for a pen register at the outset. To the CtApps' argument that subscribers have no "reasonable expectation of privacy" because they entrust the numbers they dial to the Telco, petr replies that this reasoning only enhances the expectation of privacy. If people had a choice as to whose apparatus they used when communicating with others, the choice of the Telco's equipment might suggest a voluntary decision to transfer information to a third party. But consumers in actuality have no choice--the Telco has a monopoly--and thus a person's "decision" to reveal a number to the Telco cannot be said to evidence a voluntary conveyance of information.

For these reasons, petr concludes that he had an actual expectation of privacy, that this expectation was objectively "reasonable," and that the logging of the numbers he dialed thus constituted a "search." Since the search fell within none of the recognized exceptions to the warrant requirement, it was presumptively "unreasonable" and hence violative of the 4th Amendment.

B. Resp.

Resp begins by emphasizing that a pen register does not intercept the content of any communication. As LFP noted in his Giordano dissent, a pen register

> is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line.

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> It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations.

416 US at 549 n.1. As this Court said in NY Tel Co, moreover,

> Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers. Furthermore, pen registers do not accomplish the "aural acquisition" of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or pressing of buttons on push button phones) and present the information in a form to be interpreted by sight rather than by hearing.

434 US at 167. The only question in this case, therefore, is whether the mere recordation of telephone numbers dialed by a subscriber constitutes a "search and seizure" for 4th Amendment purposes. In answering this question, resp agrees with petr and the CtApps that the two-pronged test from Justice Harlan's Katz concurrence should be applied.

(1) Did Petr Exhibit an Actual Expectation of Privacy? Resp argues that telephone users in general entertain no real expectation of privacy in the numbers they dial: as several CAs have said, people normally expect privacy as to the contents of their calls, not as to the fact that they have placed a call to a certain number. People realize that the number they dial is necessarily communicated to the Telco, not only for the purpose of completing the call, but also for billing and other business purposes. People likewise realize that records of phone calls are kept, for they see lists of the long-distance numbers they've called on their monthly bills. The fact that the Telco does not usually keep records of all calls, resp argues, is of no constitutional significance. The facts that all numbers dialed are imparted to the Telco, and that all numbers dialed are capable of being recorded by it, are enough to negate any reasonable expectation of privacy in the information thus divulged. The constitutional irrelevance of any "long distance"/"local"

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distinction is underscored when one considers that the signals going out from a local call are transported by the same equipment that handles long-distance calls. This equipment is the necessary conduit of all phone calls, and the "intrusion" effected by a pen register on the dialer's privacy is identical regardless of what city he is calling. Under these circumstances, it would bizarre to hold that the dialer's constitutional rights depended on what the Telco's zone-definition practices happened to be. Resp, following the CtApps, relies on White, Hoffa, and Miller, emphasizing that the intrusion here is less than in those cases, since in those cases the content of the communication was at stake. Pen registers, by contrast, do not intercept content at all.

(2) Is Society Prepared to Recognize Petr's Subjective Expectation (If He Had One) as "Reasonable"? Resp notes that pen registers are routinely used for a variety of purposes. The Telco uses them, for example, to find out whether a home phone is being used to conduct a business; to check for defective dials; to ascertain billing errors; and to record all calls from phones subject to special rate structures. Most importantly, pen registers are routinely used by the Telco to investigate customer complaints about obscene or harassing calls. Forty-nine States now have statutes making abusive phone calls a criminal offense, and society has recognized that pen registers may legitimately be used as devices for detecting the persons responsible for such calls. Numerous courts have approved the use of pen registers by the Telco, as against "invasion of privacy" challenges, for the purpose of ferreting out violators of the law. Society's recognition that the Telco will employ pen registers to investigate customer complaints--and that, when the evidence is gathered, Telco will divulge it to the police--indicates that an expectation of privacy in the numbers one dials is unreasonable. In this case, of course, the Telco did not install a pen register on petr's phone sua sponte, but was requested to do so by police. Yet this differ-

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since, while it would obviously be significant for purposes of "state action" analysis, is really insignificant for purposes of "expectation of privacy" analysis. Once it is accepted that Telco will record numbers to detect misuse of the phone system, it is irrelevant to the dialer whether Telco is acting on its own or at the Govt's instance. Society has recognized that Telco's logging of one's numbers is permissible for any number of legitimate purposes--billing, correcting errors, preventing abuse. Law enforcement is simply one more such legitimate purpose. Given this pervasive pattern of permissible recordation, a telephone user cannot reasonably expect that any particular number he dials will remain totally private.

After concluding its Katz analysis, resp replies to petr's suggested "balancing process." Resp argues in limine that the premise of petr's argument here is erroneous. This Court has used a "balancing test" to ascertain what sort of 4th Amendment protection (a warrant, for example, or something less) is appropriate in a given case. The "balancing test," in other words, assumes that the 4th Amendment is applicable, whereas the question here is whether pen registers effect a "search or seizure" such that the 4th Amendment comes into play at all. Even assuming that some sort of balancing is proper here, moreover, it would not, on resp's view, suggest a different result. On the one hand, the burden on law enforcement imposed by a warrant requirement would be substantial: the time necessary to secure a warrant may be considerable, and the usefulness of pen registers will be eliminated entirely in cases where reasonable suspicion, but no probable cause, exists. On the other hand, the privacy interests to be protected are slight, since pen registers leave the contents of communications inviolate. Nor is there any real possibility that pen registers will be abused, e.g., by being converted into more insidious devices like wiretaps. Law enforcement officers and phone companies alike know the limits of their authori-

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ty under Title III, and no "slippery slope" from permissible pen registers to impermissible wiretaps need be feared. In any event, this Court must presume that law enforcement officers will obey the law. It could just as plausibly be argued that a warrant to search "X" for "Y" could be abused by police desirous of converting it into a "general warrant." Yet this possibility is obviously no reason for refusing to issue the search warrant in the first place.

In sum, resp concludes that the installation of a pen register effects no "search or seizure" within the meaning of Katz, and that the 4th Amendment's warrant requirement is thus inapplicable. This conclusion, on resp's view, is mandated, not only on analysis of people's realistic "expectations of privacy" in the numbers they dial, but also on policy grounds.

IV. DISCUSSION.

For me, this is a very simple case. I believe that the installation of a pen register does not constitute a "search or seizure" and that the decision below should be affirmed.

A. Actual Expectation of Privacy. The average phone user, I would suspect, does not harbour any significant expectation of privacy regarding the fact that he has dialed a particular number on his phone. All phone users are aware from their monthly bills that the Telco records long-distance dialings. Some users may infer--from the fact that local calls are generally governed by a flat rate, rather than a per-call rate-that the Telco does not usually record local dialings. Yet I wonder how many subscribers consciously draw this inference: the Telco could have any number of reasons for keeping track of local calls too--to gauge the volume of calls over particular circuits, for example, or to get some idea of what a fair monthly charge would be. Phone users, in other words know for a fact that the Telco records some calls, know for a fact that

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the Telco has the facilities for recording all calls, and might well suspect, if forced to think about it, that the Telco may have reasons (unrelated to billing, perhaps) for recording local dialings in particular. On a common-sense level, it seems hard to imagine that people would seriously think that the numbers they dial into a computerized phone network will remain a secret from the phone company.

The fact that petr dialed McDonough's number from his own home does not, to my mind, call for any different conclusion. Contrary to petr's argument, Katz is quite different from this case. Katz wanted to keep the contents of his phone call private, and he reasonably took steps toward this end by shutting the doors to his phone booth. Yet petr, by the mere act of dialing from home, could not keep the number he was dialing "secret" from the phone company--regardless of where petr called from, he would have to reveal that number to the phone company in precisely the same way. Petr, by calling from home, may well have evinced a desire to keep the obscene contents of his calls secret; the numbers he dialed are something else again.

B. "Reasonable" Expectation of Privacy. Even if petr here had some expectation that the number he dialed would remain private, I doubt that society is prepared to recognize this expectation as reasonable. Everyone concedes that a person can have no legitimate expectation of privacy in the long-distance numbers he dials. The Telco keeps routine business records of these numbers, and this Court's cases establish that a person has no legitimate expectation of privacy in business records furnished to a third party. Everyone concedes, moreover, that the Telco in some circumstances does record all dialings from a particular residence--to check billing errors, to monitor equipment malfunctions, to trace harassment calls--and that the Telco could record all dialings if it chose to. Given this, to make the existence of a constitutionally-protected privacy interest contingent on the fortuity of a private

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company's billing practices would be most bizarre. It is, after all, a Constitution that we are interpreting. When a person dials a number--any number--he takes the risk that the Telco will record that number for a variety of legitimate business purposes. Having taken that risk, the dialer can claim no reasonable expectation that the number should remain his little secret.

I think this result is consistent with the trend of this Court's cases. Viewing the matter broadly, one may suggest that there are two types of "surveillance" cases. One group consists of cases involving mail covers, visual surveillance (through binoculars if necessary), beepers, and the like. These various "devices" are similar in that they take in what might be called the "externals" of people's activity--their physical location in space, their name and address, the destination of their movements and correspondence. These devices, in other words, keep track only of that which one must necessarily reveal to others in conducting one's affairs. The other group consists of cases involving wiretaps of phone calls or opening of letters. Here, where surveillance necessitates taking in the contents of people's communications, the 4th Amendment applies and a warrant is necessary. Pen registers, in my view, belong quite firmly in the former group. Pen registers, like mail covers, beepers, and visual surveillance, take in no content: they take in only the facts that the dialer must necessarily reveal to others (here, the phone company) in going about his business. Pen registers reach only the "externals" of communication--the bare fact that a number has been dialed. Just as one must "reveal" the outside of an envelope in order to get it delivered, so one must reveal the number one dials in order to get the call completed. To the extent that one necessarily discloses certain data for the purpose of using modern methods of communi cation, one pro tanto surrenders any "expectation of privacy" as to the data necessarily disclosed.

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Finally, to hold that installation of a pen register is a "search," and thus to hold that such installations are subject to a warrant requirement, would, in my view, impose a serious burden on law enforcement. It is my understanding that pen registers are customarily used in the investigative phase of criminal proceedings: pen registers, that is, are used to help get evidence sufficient to make out probable cause to arrest or search. This was the pattern in this case: the police had a suspicion of petr, but perhaps not probable cause; they installed a pen register, and that produced a key fact--that petr had called McDonough. On the strength of that fact (plus earlier evidence) the police got a search warrant; that search turned up yet more incriminating evidence, and the police then had probable cause to arrest. As the investigation in this case reveals, therefore, the police often may not have probable cause at the time they need to install a pen register; if a warrant is required for all installations, therefore, pen registers will be useless at the early stages of investigations where the police have nothing but a strong suspicion.

V. CONCLUSION

I conclude that the installation of a pen register is not a search for 4th Amendment purposes, and hence that no warrant is required prior to such installations. Accordingly, the decision of the Md CtApps should be aff'd.

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QUESTIONS

For petr:

You have argued that telephone users have an "expectation of privacy" as to the local numbers they dial because the telephone company does not normally keep records of local calls. Does not your argument mean that the existence vel non of a constitutionally-protected privacy interest will depend on the fortuity of a private corporation's billing policies at any point in time? Does this mode of reasoning strike you as odd?

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HAB--

Here's a draft of Smith v. Maryland. It's a short, rather unscholarly opinion, rather befitting the case, which really requires little more than some common sense and a straightforward application of Katz, Miller, and White. There were five votes at Conference to hold "no search," and that's the way I've written the opinion; this follows your Conference vote and my bench memo.

On pp. 5 & 6, I've included cites to Rakas v. Illinois, No 77-5781, which was decided in December of this Term. I've merely put "blank U.S." cites in the text, but I thought that you might like to know the slip opinion references for sake of convenience. Here they are:

Page 5: Majority--slip op. at 15, and note 12.
LFP concurring--slip op. at 1, 2.
BRW dissenting--slip op. at 9.

Page 6: Majority--slip op. at 15 note 12.
LFP concurring--slip op. at 2.

I've included in the pile of materials everything you should need to do the opinion: a Cornell L Rev article; a Drake L Rev article; xeroxes of the Baltimore and DC phone books; and the advance sheets of Maryland Reports containing the opinion below. Everything else that is cited should be in the Justices' Library.

AGL 5/14/79

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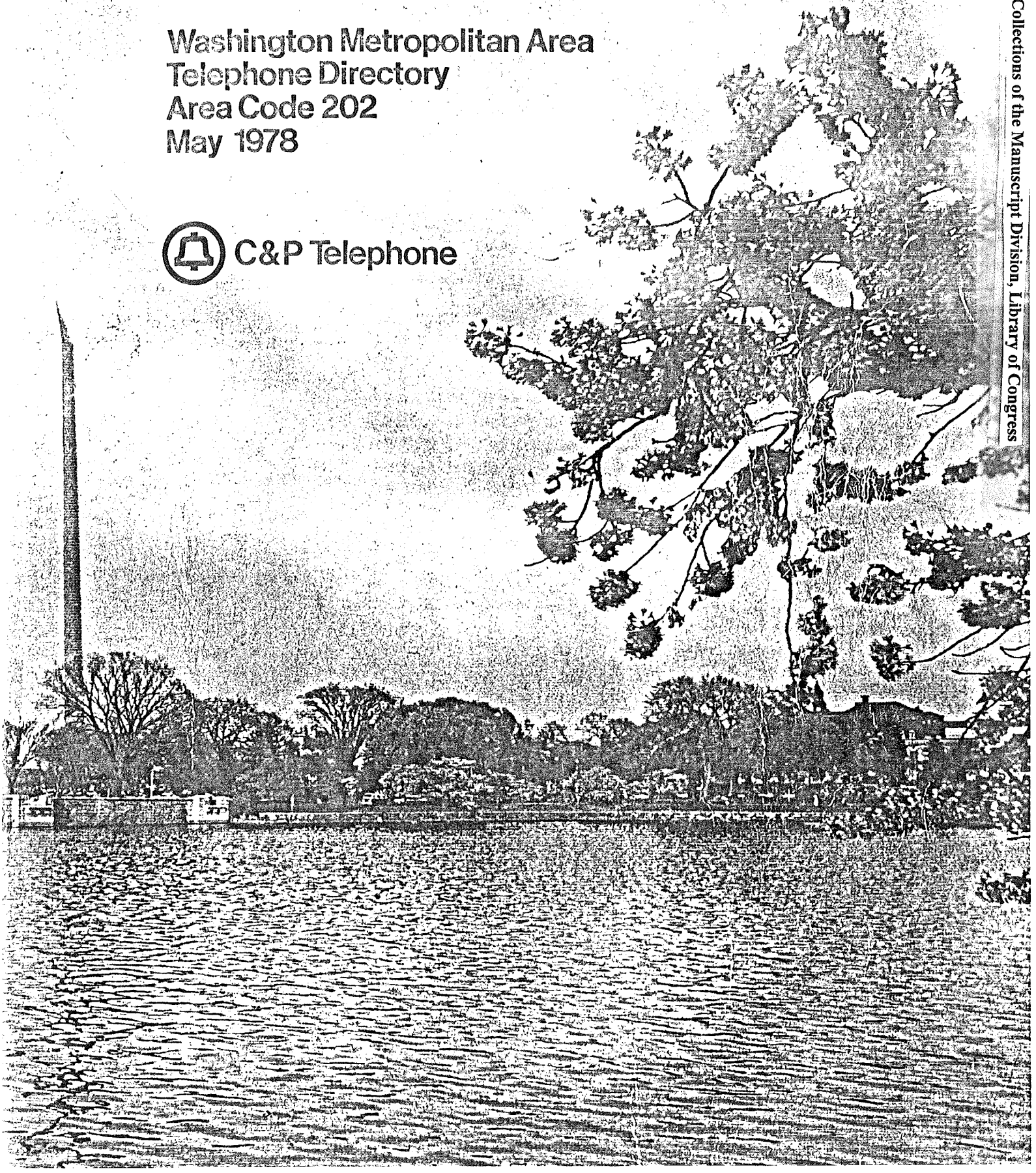
78-5374
Smith v. Md

District of Columbia

Washington Metropolitan Area Telephone Directory Area Code 202 May 1978

C&P Telephone



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Consumer Information

3. Follow the installation, operational, routine maintenance and routine repair procedures specified by the manufacturer.

Any items used with the Company's facilities and equipment in violation of the tariffs may lead to the removal of the equipment, apparatus, device or system, or in the suspension of the customer's telephone service.

A maintenance visit charge applies per visit to a customer's premises where a service difficulty or trouble report is caused by customer provided equipment. You should contact your Service Representative or Account Executive for more information concerning these regulations.

Tariffs

Tariffs which show rates, rules, and regulations for telephone service and facilities within the District of Columbia are approved by the Public Service Commission, 1625 I Street, N.W. Washington, D.C.. Tariffs are available in our Business Office for public inspection.

Taxes

A Federal tax will apply on certain items of telephone service, equipment and messages. NO tax applies on telephone directory advertising or on service connection charges, moves or change charges.

Your Telephone Number Is Important.

When your telephone number is preceded by your area code, it is the only one like it in the United States or Canada. When leaving your telephone number for someone else to call you, be sure to include the area code if the caller will be calling from a different telephone area than your own.

For Your Protection

Abusive Calling

Under Federal Law, any person who uses a telephone, or knowingly permits another to use his/her telephone, for making abusive, obscene or harassing calls within the District of Columbia or across state lines commits a crime which is punishable by $500 fine, six months in prison, or both.

C&P is anxious to help stop abusive calls; full cooperation and technical assistance will be given to legal authorities in enforcing the law.

Annoying and Anonymous Calls— What You Can Do About Them

1. *Don't talk* to persons of whom you are doubtful. Don't give them the audience they want.

2. *Hang up* at the first obscene word, or if the caller doesn't say anything, or doesn't provide identification to your satisfaction.

3. *Call your business office* if the annoyance persists. We have employees who are trained to assist and advise you and who can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.

Employee Identification Cards

For your protection, every employee carries an official identification card showing his or her name, photograph and signature.

If you have the slightest doubt about persons who say they are from the Telephone Company, please ask to see their card.

Fraud Penalties

For your protection, new equipment and procedures enable the Telephone Company to detect and investigate fraudulent calls. State law provides that no person shall defraud or attempt to defraud the Telephone Company of its lawful charges. Violators, upon conviction, are subject to imprisonment for up to 10 years or to a fine of up to $1,000 or both.

Teach Your Children to Dial "911" Or "0" In Emergencies

Show your children how to use the telephone in an emergency by teaching them how to dial "911" or "0" for the police or operator. Also make sure they know their home telephone number and encourage them to always call home if they are going to be late. Give them change to carry for emergencies.

When You Hear a "Beep" Tone

A short "beep" tone heard on your telephone line about every 15 seconds means that the person with whom you are talking is recording your conversation. This signal is provided by the Telephone Company for your protection. Use of a recorder without recorder-connector equipment containing a tone-warning device is contrary to the Company's tariffs and is not permitted. If you do not want a record made of what you are saying, ask the person with whom you are talking to disconnect the recording machine. When it is disconnected, you will no longer hear the "beep" tone.

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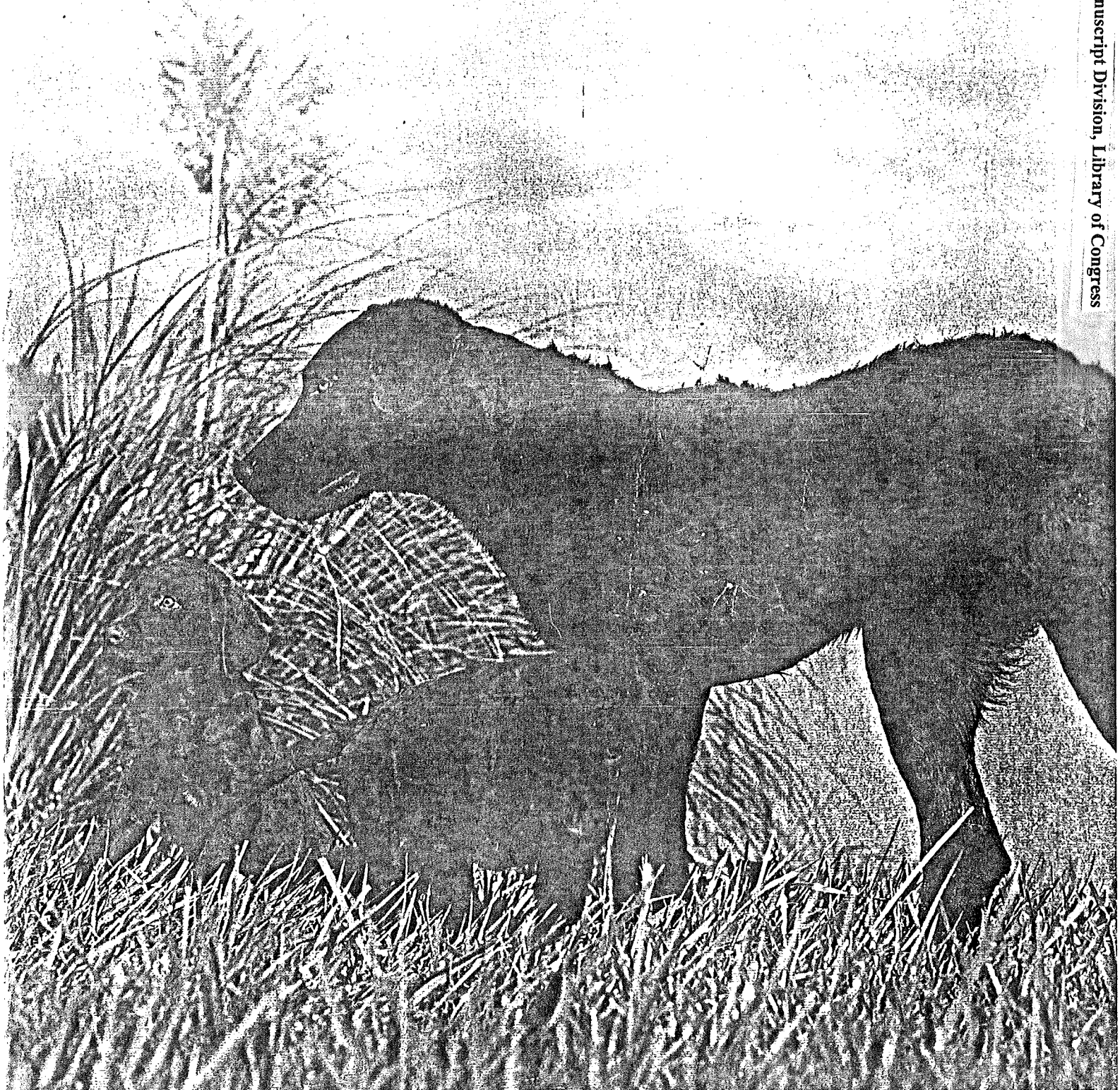
Baltimore Metropolitan Area

C&P Telephone

Telephone Directory
Area Code 301
November 1978



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Consumer Information

For Your Protection

Abusive Calling

It is a criminal offense under Maryland and Federal Laws for any person to make use of telephone facilities and equipment for:

1. Anonymous Calls—
If in a manner reasonably expected to annoy, abuse, torment, harass, or embarrass one or more persons; or

2. Repeated Calls—
If with intent to annoy, abuse, torment, harass, or embarrass one or more persons; or

3. Any Comment—
Request, suggestion, or proposal which is obscene, lewd, lascivious, filthy or indecent.

These offenses are punishable by fine and/or imprisonment. In addition, under Federal law it is also a criminal offense for anyone who knowingly permits any telephone under their control to be used in Interstate or Foreign communications for any of the purposes noted above.

The Telephone Company will assist its customers in cases of this type. Just call your local Company Business Office.

Annoying and Anonymous Calls—What You Can Do About Them

1. *Don't talk* to persons of whom you are doubtful. Don't give them the audience they want.

2. *Hang up* at the first obscene word, or if the caller doesn't say anything, or doesn't provide identification to your satisfaction.

3. *Call your Business Office* if the annoyance persists. We have employees who are trained to assist and advise you and who can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.

False Fire Alarms

It is a criminal offense under Maryland law for any person knowingly to give or cause to be given any false alarm of fire. This offense is punishable by fine and/or imprisonment.

Emergency Calls on Party Lines

It is a criminal offense under Maryland law to refuse to relinquish the use of a party line immediately when informed that it is needed for an emergency call. It is also an offense to state falsely that a party line is needed for an emergency call. The law defines "emergency" as "a situation in which property or human life are in jeopardy and the prompt summoning of aid is essential." This offense is punishable by fine and/or imprisonment.

Telephone Solicitation

Some Basic Guidelines

1. Find out who is calling. Maryland law requires a sales solicitor to state: name, company's name, the reason for the call and what is being offered.
2. If you are not sure of your interest and would like additional information, ask the caller to *mail* you such additional information about the offer or charity *before you decide*. A legitimate caller won't hesitate to do so.
3. If you are not interested, just cut in and politely refuse the offer. If the caller persists, hang up.

If you think a telephone solicitor is violating the law, call the Consumer Protection Division of the Attorney General's Office. Call Baltimore - 383-3700 (a charge may apply).

Employee Identification Cards

For your protection, every employee carries an official identification card showing his or her name, photograph and signature. If you have the slightest doubt about persons who say they are from the Telephone Company, please ask to see their card.

Fraud Penalties

For your protection, new equipment and procedures enable the Telephone Company to detect and investigate fraudulent calls. State law provides that no person shall defraud or attempt to defraud the Telephone Company of its lawful charges. Violators, upon conviction, may be subject to imprisonment for up to 6 months or a fine of up to $500 or both.

Credit Card Fraud

Any person who publishes or causes to be published, either orally or in writing, the number or code of an existing, cancelled, revoked, expired, or non-existent telephone credit card, or the numbering or coding system which is employed in the issuance of telephone credit cards, with the intent that it be used or with knowledge that it may be used to fraudulently avoid the payment of any lawful toll charge, is guilty of a misdemeanor. Violators, upon conviction, are subject to imprisonment for up to 12 months or to a fine of up to $500 or both.

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32144© The Chesapeake and Potomac Telephone Company of Maryland.

78-5274

HAB--

This looks fine--quite a clean copy. I marked the typos I was able to find.

As to the repetition of phraseology at pp 5-6, I see what you mean. However, I did not intend the two sentences to say the same thing. The sentence on p. 5 says merely that petr is claiming some legitimate expectation of privacy. The question then becomes, "An expectation of privacy as to what?" This in turn depends on the nature of the Govt intrusion, which is described at pp 5-6. Based on the limited capabilities of pen registers--all they do is record the numbers dialed--the draft concludes that petr's claimed expectation of privacy must relate only to the numbers he dialed. Hence the sentence on p 6 that you questioned: "petr's claim necessarily rests upon a claim that he had a legitimate expectation of privacy regarding the numbers he dialed on his phone." This sentence does say something different from the sentence on p 5, although as you rightly point out there is a lot of overlap in the introductory part of the sentence. Can you think of a way to tone down the overlap, while preserving the distinction? One way might be to change "infringed a 'legitimate expectation of privacy' petr held" on p 5 to "infringed some 'legitimate expectation of privacy' petr held."

AGL 9/23/79

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 24, 1979

Re: 78-5374 - Smith v. Maryland

Dear Harry:

The point I intend to make in a short concurrence may be one that you will be willing to cover in your opinion, in which event I will simply join you. It relates to the significance of the individual's actual or subjective expectation of privacy. I would like to make sure that an individual citizen does not lose his Fourth Amendment rights in either of two hypothetical situations:

1. Assume that a new Adolf Hitler installs nationwide loudspeakers notifying the entire populace that henceforth all homes shall be open to unwarranted and unlimited search. Such publicity would eliminate any actual subjective expectation of continued privacy, but surely would not destroy the citizen's Fourth Amendment protection.

2. Assume that a refugee from a totalitarian country is unaware of our traditions of freedom and incorrectly believes that all his telephone conversations are being monitored by the secret police. He should nevertheless retain his Fourth Amendment protections.

I do not believe your opinion is intended to disagree with either of these assumptions. However, unless something similar to these examples is expressly disclaimed, I am afraid that the emphasis on actual expectation of privacy may be subject to misreading. Do you think you could put in an appropriate footnote to make it clear that the emphasis on actual expectation does not include this sort of situation?

Respectfully,

John

Mr. Justice Blackmun

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 24, 1979

RE: No. 78-5374 - Smith v. Maryland

Dear Harry:

As a post script to my earlier letter, this thought has occurred to me. Perhaps the subjective or actual expectation of privacy is most important when we are evaluating a claim that Fourth Amendment protection should be extended into a new area--wiretap in Katz and pen registers here--but would not be relevant in situations, such as house searches, where Fourth Amendment protection is well recognized in our decided cases. This is just a suggestion.

Respectfully,

Mr. Justice Blackmun

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HAB--

I've seen both of JPS' letters of today, and have drafted a new fn. 5 to address his concerns. I was somewhat hesitant about adopting the suggestion in his second letter--that different inquiries would be proper depending on whether an "old" or "new" mode of police surveillance was being used. My hesitancy, I suppose, can be traced to uncertainty about the ramifications of such a per se rule. I did, however, try to accommodate JPS' second letter somewhat by writing, "alien to well-recognized Fourth Amendment freedoms," in the footnote. JPS' clerk said this might be satisfactory to his boss.

5/24/79 AGL

P.S. If this looks OK, I can run it by JPS and WHR to see if they're agreeable; then it could go to the printer in time for circulation tomorrow. Alternatively, we could just circulate it in typed form.

OK HAB 24 May 79

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Illinois, — U. S. —, —, and n. 12 (1978); *id.*, at —, — (concurring opinion); *id.*, at —, (dissenting opinion); *United States* v. *Chadwick*, 433 U. S. 1, 7 (1977); *United States* v. *Miller*, 425 U. S. 435, 442 (1976); *United States* v. *Dionisio*, 410 U. S. 1, 14 (1973); *Couch* v. *United States*, 409 U. S. 322, 335–336 (1973); *United States* v. *White*, 401 U. S. 745, 752 (1971); (plurality opinion); *Mancusi* v. *DeForte*, 392 U. S. 364, 368 (1968); *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968). This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U. S., at 361—whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *id.*, at 361—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiabl[e]" under the circumstances. *Id.*, at 353. See *Rakas* v. *Illinois*, — U. S., at — n. 12, *id.*, at — (concurring opinion); *United States* v. *White*, 401 U. S., at 752 (plurality opinion).

B

In applying the *Katz* analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is challenged. The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area." Petitioner's claim, rather, is that, notwithstanding the absence of a trespass, the State, as did the Government in *Katz*, infringed a "legitimate expectation of privacy" petitioner held. Yet a pen register differs significantly from the listening device employed in

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5/ Situations can be imagined, of course, in which Katz' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.

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May 24, 1979

Re: No. 78-5374 - Smith v. Maryland

Dear John:

In response to your letters, I suggest the following:

1. On page 5 of the opinion, 10th line, insert the word "normally" before the word "embraces."

2. Insert a footnote sign "5" after the figures "353" on the third line preceding part B. The enclosure would then be the footnote.

Does this meet your concerns?

Sincerely,

Mr. Justice Stevens

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 24, 1979

Re: 78-5374 - Smith v. Maryland

Dear Harry:

Many thanks. Your changes completely resolve my problem. I definitely will not write separately.

Sincerely,

Mr. Justice Blackmun

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MEMORANDUM

TO: HAB
FROM: AGL
RE: Smith v Maryland, No. 78-5374 (TM dissent circulated 6/8/79)
DATE: 6/8/79

I have studied TM's dissent, and don't think it necessitates any response on our part. TM predicates his dissent on his own dissents in Schultz and Miller, and on JMH's dissent in White. TM, in other words, seems to agree that our result is consistent with the Court opinion in Miller, and dissents here only because he dissented there. TM's theory that persons retain an expectation of privacy in information they divulge to third parties for a limited purpose, dissent at 1, 2, 7, was expressly rejected by this Court in Miller, as our quotation from that opinion, draft at 8-9, makes clear. TM's theory is extremely broad--it would give telephone users a legitimate expectation of privacy, not only in local numbers the Tel Co does not record, also in toll-call numbers the Tel Co does record for billing purposes. TM's theory, in other words, would give telephone users a legitimate expectation of privacy in the Tel Co's business records. Yet Miller held that a depositor has no legitimate expectation of privacy in a bank's business records.

WJB, PS, and TM originally voted to dissent in this case. WJB may be able to join TM's dissent without difficulty. TM's opinion, however, may pose problems for PS. PS joined the Court's opinions in Miller, Couch, and the plurality opinion in White. Since TM's dissent is predicated on a rejection of those opinions, I really don't see how PS can join it.

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MEMORANDUM

TO: HAB
FROM: AGL
RE: Smith v Maryland, No 78-5374 (PS dissent circulated 6/13/79)
DATE: 6/13/79

I've read PS's dissent and don't think it calls for any response. PS makes no effort to distinguish this case from Miller and White, both of which he joined. His theory, basically, seems to be the same as TM's, although TM's frankness prevents PS from joining that opinion directly.

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